

**Florida's Request To Assume Administration of a Clean Water Act Section 404 Program  
(85 FR 57853, September 16, 2020) EPA-HQ-OW-2018-0640**

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**Code 11. Jurisdictions**

Commenters (0022, 0229, 0536) opposed shifting control of waters and wetlands from the jurisdiction of the Army Corp of Engineers and the Environmental Protection Agency to the state of Florida.

One commenter (0229) stated that no environmental protection should be lessened, and no control of federal lands should be transferred to Florida.

One commenter (0536-A1) asserted that the state of Florida does not have comparable state laws and regulations, and thereby legal jurisdiction, necessary to ensure compliance with these federal requirements.

One commenter predicted that Florida's interpretation of "waters of the United States" could lead to destruction of the wetlands and the destruction of vitally important species in the state. The commenter (0022) noted that the state of Florida has around 11.4 million acres of wetlands, with freshwater wetlands making up about 90 percent of the state's wetlands, and these wetlands are home to many different species, including endangered species.

**Code 11a. Army Corps of Engineers versus state jurisdiction**

Multiple commenters (0051, 0053, 0211, 0212, 0215, 0218, 0224, 0346, 0386, 0412, 0413, 0435, 0514, 0515, 0429-Almedo, 0429-Crooks, 0429-Lomberk, 0430-Kelly) argued that the state has failed to specifically identify which waters and wetlands will be assumed under state jurisdiction and which will be retained under the jurisdiction of the Army Corps of Engineers. The same commenters questioned the history, accuracy, and completeness of the list of retained waters in the Florida DEP's Section 404 Handbook and argued that because the application does not contain a list or map of the assumable and retained waters, the application should be considered incomplete.

Two commenters (0051, 0386) argued that the question of which waters the state intends to assume jurisdiction over is central to an evaluation of the program and noted that 40 CFR 233.11(h) requires that a state submission must include a "[d]escription of the waters of the United States over which the state assumes jurisdiction [and a] description of the waters over which the federal government retains jurisdiction."

One commenter (0386) argued that Florida Statutes § 373.4146 failed to address the question of which waters will be assumed, and instead, only tautologically defines "state assumed waters" as those "waters of the United States that the state assumes permitting authority over pursuant to [Section 404]." Id. § 373.4146(1). The commenter argued that this definition has no substance and does not reflect the federal definition of Waters of the United States. The commenter noted

that the state's proposal also does not adopt, reference, or mention the federal definition of waters of the United States. Instead, the proposed program uses the term "state-assumed waters," which it defines as "all waters of the United States that are not retained waters." Fla. Dep't of Env't Prot., State 404 Program Applicants' Handbook § 1.1 [hereinafter "404 Handbook"]. Florida's authorizing legislation similarly defines "state-assumed waters" as "waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act ... and rules promulgated thereunder." Fla. Stat. § 373.4146(1).

One commenter (0051) noted that none of the program-related definitions are provided by statute or in the state's implementing regulations, but rather appear in an applicant handbook and noted that Fla. Admin. Code Ann. r. 62-331.030 states that "Terms used in this Chapter are defined in section 2.0 of the 404 Handbook." The commenter further noted that the Florida Department of Environmental Protection's State 404 Program Applicant's Handbook (hereafter, "the 404 Handbook") at § 2.0(b)(47), in turn, defines "State-assumed Waters" or "Assumed Waters" to mean "those waters as defined in Section 373.4146(1), F.S." and that Florida Statutes Section 373.4146(1) provides no further clarity and simply states that "the term 'state assumed waters' means waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material." The commenter concludes that, in other words, Florida defines state-assumed waters as those waters over which the state assumes jurisdiction.

One commenter (0086) recommended that the state recognize and apply the status of wetlands/waters of the United States as classified under existing/valid COE approved jurisdictional determinations. The commenter noted that the currently proposed language reads as follows:

"The State 404 Program applies to state-assumed waters of the United States (WOTUS) as defined at 40 C.F.R. Part 120. To provide certainty, streamlining, and efficiency, the Department will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered waters of the United States, and will treat them as if they are, unless the applicant requests a WOTUS jurisdictional determination, and provides documentation that clearly demonstrates a water is not a WOTUS, subject to Department verification and agreement."

The commenter (0086-A1) recommended the following changes:

"The State 404 Program applies to state-assumed waters of the United States (WOTUS) as defined at 40 C.F.R. Part 120. To provide certainty, streamlining, and efficiency, the Department will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered waters of the United States, and will treat them as if they are, unless the applicant requests a WOTUS jurisdictional determination, and provides documentation that clearly demonstrates a water is not a WOTUS, subject to Department

verification and agreement. provides an existing/valid COE approved jurisdictional determination then that classification would apply."

Several commenters (0051, 0215, 0386, 0412, 8888-Crooks) noted that the list of waters that would be "Retained Waters" in the Florida DEP's Section 404 Handbook (see § 2.0(b)(41) and Appendix A), is substantially shorter than the list of Retained Waters produced by the Army Corps of Engineers in October 2017.

One commenter (0429-Lomberk) stated that the department's maps in the assumption application were low resolution and impossible to read with any degree of specificity. The commenter also argued that the list of waters that was provided was vague, with no specification about where the waterways are located. The commenter noted that many waterways across the state share the same name, so listing a waterway like Deep Creek, for example, with no description of location is confusing and insufficient to notify the public and to inform the program.

One commenter (0425) provided a list of waters that it contends should remain under Army Corps jurisdiction and this list can be found in docket item EPA-HQ-OW-2018-0640-0425. The commenter formally requested that these waters be included in the list of waters retained under the Army Corps of Engineers' Section 404 permitting authority should this application package move forward.

Once commenter (0413) representing the Seminole Tribe stated that no information has been provided to the Seminole Tribe as to the exact waters of the state which will remain under Corps jurisdiction and which waters will be assumed by the state. The commenter stated that the Seminole Tribe recognizes that FDEP is not seeking to assume the 404 Program in Indian Country, but the commenter reiterated prior requests to be provided GIS Layers of the retained versus assumed waters to ensure that Indian Country remains under the jurisdiction of the Corps 404 program and to better understand what waters adjacent to Indian Country will be assumed by the state.

One commenter (0212) noted that the state is crossed by many waterways, some of which are navigable under state law and others under federal law by various court decisions, and all have adjacent wetlands. The commenter predicted that the lack of clarity would lead to unnecessary litigation and confusion in the permitting process for future developments that impact waterways.

One commenter (0051) noted that the 404 Handbook § 2.0(b)(41) provides a definition for the opposite of state-assumed waters, which are the "Retained Waters," which are navigable waters over which the U.S. Army Corps of Engineers would retain exclusive permitting jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 if state assumption is granted. (See 33 U.S.C. § 403.) The commenter further noted that Florida explicitly defines "Retained Waters" as including those "identified in the Retained Waters List (Appendix A)" (see 404 Handbook § 2.0(b)(41)), and Appendix A, in turn, consists of a 4-page list of rivers and creeks, mostly by name only), dated August 23, 2019.

The commenter (0051) noted that the “Retained Waters List” maintained by the U.S. Army Corps of Engineers for Florida has been the subject of substantial change since Florida began its efforts to assume the 404 program in 2018. The commenter noted that on March 19, 2018, the Corps initiated a 30-day public comment period to end on April 20, 2018, “regarding use of waters in the state of Florida for navigation ... [including] identification of those rivers, streams, lakes, etc. associated with past, current, or potential future commerce, commercial traffic, or recreational activities” for purposes of navigability analyses to determine “which waters are subject to permitting authority under Section 10” and “determining the waters that would be retained by the Corps if the EPA approves the State’s application for Section 404 Program assumption.”<sup>1</sup> The commenter noted that on April 5, 2018, the Corps posted its solicitation for public comment on this matter on the website for the Jacksonville District,<sup>2</sup> but on April 10, 2018, the Corps issued an “Updated Public Notice” summarily terminating the comment period effective immediately, deeming “the comment period originally set to expire on April 20, 2018 . . . closed until further notice.”<sup>3</sup> The commenter stated after more than two years, there has been no “further notice,” and no further opportunity for the public to comment, even now that Florida has submitted its 404 application to EPA.

The commenter (0051) noted that the Corps’ list of Retained Waters that appears to be part of Florida’s submission to EPA is only 4 pages compared to the 17 page Retained Waters list supplement produced by the Corps in October 2017.

The commenter (0051) reported that in comments submitted by the original deadline of April 18, 2018, they reminded the Corps about Florida’s extensive water resources and unique hydrology, and that any navigability study would require a thorough analysis of numerous waterways and site-specific hydrology and other factors to determine which waters may be assumable and the adjacency of wetlands located throughout the state.

Two commenters (0051, 0386) noted that other commenters in 2018 echoed similar concerns and submitted lists of additional waterways that the Corps should consider navigable, but Florida’s 404 program submission to EPA, however, accounts for none of these additional submissions and purports to limit the “Retained Waters” to a 4-page list that is vague, incomplete and has not been subject to notice and comment. The commenters argued that the current list is grossly lacking because it reflects a far more restrictive view of retained waters than the Corps possessed in 2017, and the Corps has failed to engage the public in performing an adequate navigability study that would accurately reflect the scope of exclusive federal jurisdiction. As a result, according to the commenters, the Corps’ ceding jurisdiction over those waters to Florida for

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<sup>1</sup> Commenter’s reference: U.S. Dep’t of the Army, Public Notice: Determination of Navigable Waters, Mar. 19, 2018 (Exhibit 2. See DCN EPA-HQ-OW-2018-0640-0052-A1).

<sup>2</sup> Commenter’s reference: Press Release, U.S. Army Corps of Eng’rs, Corps Seeks Public Comment Regarding Water Use for Navigation (Apr. 5, 2018), <https://www.saj.usace.army.mil/Media/News-Releases/Article/1485269/corps-seeks-public-comment-regarding-water-use-for-navigation> (Exhibit 3. See DCN EPA-HQ-OW-2018-0640-0052-A1).

<sup>3</sup> Commenter’s reference: U.S. Dep’t of the Army, Updated Public Notice: Cessation of Public Comment Period, Apr. 10, 2018 (Exhibit 4. See DCN EPA-HQ-OW-2018-0640-0052-A1).

purposes of 404 assumption violates the Rivers and Harbors Act and renders EPA approval of such a program untenable.

One commenter (0051) argued that Florida has failed to provide the public with GIS or other mapping that would demonstrate the scope of the jurisdiction Florida intends to claim if its 404 assumption application is granted, and would allow the public to evaluate and comment on the impact this proposal will have on the waters that are of ecological and economic benefit to them. As a result, according to the commenter, Florida's application is incomplete.

One commenter (0211-A2) provided an example of how the state's plan to assume the 404 permitting responsibilities provides little clarity on which jurisdiction would be responsible for permit approval to impact large swaths of wetlands in Lee County. The commenter stated that they had been working to oppose a proposed development in mangrove wetlands in a Lee County zoned Coastal High Hazard Area that would eliminate 36 acres of mangrove habitat by dredging and filling new canals for 55 home sites with docks and a new boat basin with several adverse environmental effects. The commenter stated that the issues surrounding the permit authority for this development posed unanswered and open questions that have not been addressed by the FDEP's application to the EPA, specifically, exactly which waters will be assumed by the state of Florida and how will it address federally listed and endangered species? The commenter argued that the issues surrounding this proposed residential development cannot be properly addressed when both the public and the applicant cannot verify exactly who is the permit authority. The commenter argued that clarity on these issues must be included in the state's application to the EPA before approval is considered.

One commenter (0215) compared the list found at Appendix A of Florida's 404 Handbook and the list of navigable waters that the Jacksonville District of the Army Corps of Engineers has on their website, accessed on October 28, 2020. The commenter documented differences between the two lists in their comment letter and noted that some waterways have been added to the August 23, 2019 list, but about 29 waterways are on the navigable waters list currently on the US Army Corps of Engineers website that are not found on the list of retained waters provided by FDEP in their 404 Handbook. The commenter also expressed concern that neither the list contained in the FDEP 404 Handbook nor the list on the Army Corps website are complete because in 2017, the Army Corps of Engineers provided a supplemental list of navigable waters for public comment that was 17-pages long, dated October 5, 2017. The commenter stated that this longer list of waters was intended to supplement the navigable waters list, thereby revealing that many navigable Florida waterbodies appear to be missing from the list used by FDEP in its assumption package submittal. The commenter provided a copy of the 17-page supplement and a copy of an earlier letter describing additional waters that may be considered for inclusion on the list. The commenter argued that it is evident that the requirement to provide a description of the assumed versus retained waters is incomplete and, thus, the Florida Department of Environmental Protection's program description is invalid.

Two commenters (0218, 0412) argued that neither the state nor the Corps has provided a compelling justification for the large differences between the proposed list of retained waters and the original list provided by the Corps in October 2017 when the state began the assumption process. The commenters cited, as an example, that it is not clear why a lake like Lake Trafford

is no longer on the list when it has important recreational bass fishing, a marina, and has seen a significant investment of funds from the Corps to restore water quality.

Several commenters (0218, 0412, 0413) argued that an obvious example of all the Waters of the United States that should be retained by the Corps in Florida are the waters of the Greater Everglades Ecosystem, including the waters of the Kissimmee Valley, Lake Okeechobee, the Water Conservation Areas, Shark River Slough, Big Cypress Swamp, the Ten Thousand Islands, Biscayne Bay, Rookery Bay, and Florida Bay. The commenter stated that these waters are commercially vital, attracting significant interstate and international fishing and tourism uses. The commenter argued that retention would reinforce the shared responsibilities of state and federal partners and provide consistency for the ongoing permitting, construction, and implementation of the Comprehensive Everglades Restoration Plan (CERP), ensuring all CERP projects will be subject to same review process. Finally, the highly connected nature of waters in the “River of Grass” that flow across the surface and through the porous limestone of the aquifers as they supply drinking water to millions of Floridians and fresh water to Biscayne Bay and Florida Bay makes it difficult to separate any individual water from those subject to Section 10.

One commenter (0223) representing the state of Florida noted that some commenters have argued that Florida’s program lacks an adequate description of the waters covered by the state 404 program and responded that this concern is incorrect. The commenter stated that the application clearly explains the waters for which the state of Florida would assume permitting responsibility and those which would remain under the regulatory purview of the U.S. Army Corps of Engineers. The commenter stated that this is also described in the memorandum of understanding entered between Florida and the Corps of Engineers on page 2, section II, A-C of the memorandum of understanding. The commenter added that more information can be found in the 404 Applicant Handbook Sections 2.0(b)41 and 4.1, and in the Retained Waters List in Appendix A of the 404 Handbook.

The commenter (0223) noted that comments argue that the state 404 program would not protect as many different types of wetlands as the federal regulations do. The commenter responded that this is also incorrect because the state’s jurisdiction over wetlands is not limited to Waters of the United States (WOTUS). The commenter stated that under the current ERP Program, all wetlands and other surface waters that are jurisdictional under Chapter 62-340, F.A.C., Florida’s delineation rule, are protected, including isolated wetlands that are not considered WOTUS. The commenter stated that, for efficiency sake, all wetlands and other surface waters that are jurisdictional under Chapter 62-340, F.A.C. will be treated as WOTUS under the state 404 Program unless the applicant provides documentation that a water is not a WOTUS. The commenter added that even if FDEP agrees the water is not a WOTUS for 404 purposes, that wetland or other surface water will still be protected under the ERP program, which will remain in place after assumption.

The commenter (0223) also argued that other commenters incorrectly asserted that FDEP’s rules fail to regulate the list of “Special Aquatic Sites” in Subpart E of the 404(b)(1) Guidelines. The commenter stated these sites are clearly included in FDEP’s regulations at “Special Aquatic

Sites” in section 2.0 of the state 404 Program Handbook and Florida Administrative Code Rule 62-331.053.

#### **Code 11b. Effect of New Navigable Waters Protection Rule (NWPR)**

Two commenters (0052, 0430-Michaellessi) opposed the rollback of federal EPA protections for waterways and streams and the ceding of the authority of the EPA and the U.S. Army Corps of Engineers to the Florida Department of Environmental Protection under the proposal because many wetland areas in the state of Florida are ephemeral streams, which only flow part of the year, and are isolated wetlands, which are not directly connected to larger bodies of water, and these are no longer considered “waters of the United States” under the Navigable Waters Protection Rule within the Clean Water Act.

One commenter (0430-Michaellessi) predicted that the Navigable Waters Protection Rule within the Clean Water Act eliminates many of the provisions for wetland protections that were once present and that this would encourage more rapid development of wetlands in Florida. The commenter noted that developers must no longer go to the Army Corps of Engineers and can obtain permits within 30 days and there is no more review of large multi-acre projects, unless the Army Corps gets a hold of them and does their scrutiny. The commenter stated that, based on firsthand knowledge, over 600 acres of wetlands have gone without mitigation in the months since the passing of the new water rule.

One commenter (0214) stated that the recently completed Navigable Waters Protection Rule in conjunction with the proposed program will greatly improve the overall environmental permitting process in Florida, which already regulates activities impacting wetlands under state law. The commenter asserted that by moving quickly to approve Florida’s assumption submission, the federal EPA will improve the CWA and establish a model for other states to follow as they pursue CWA Section 404 assumption in future years.

#### **Code 11c. Project Boundary and 300’ Guideline**

Several commenters (0209, 0218, 0386, 0412, 0429-Hughes) were opposed to the state’s recommended 300-foot administrative boundary around navigable waters to determine additional wetland projects to be reviewed by the Corps because they argued that this boundary is too narrow given Florida’s unique geology and hydrology.

Two commenters (0218, 0412) noted that the sub-surface connection among water bodies is much greater in Florida’s highly transmissive karst environment and requires a boundary that more accurately reflects the extent to which neighboring wetlands impact navigable waters. The commenters recommended that the guideline should be based on a scientific evaluation of Florida’s geophysical characteristics rather than the 300-foot default guideline proposed in the Final Report of the Assumable Waters Subcommittee. The commenters noted that the Final report stated the buffer could be determined at the state level to consider natural features.

Two commenters (0386, 0429-Hughes) noted that the only other states to have assumed a Section 404 program have utilized the more protective 1,000-foot buffer, and no less should be required of Florida in order to satisfy the Clean Water Act.

Two commenters (0209, 0429-Hughes) asserted that the 300-foot lateral/adjacent FDEP determination is entirely a political determination that should disqualify FDEP from assuming the federal Section 404 Program. One commenter (0429-Hughes) noted that water management district governing boards are all political appointees and asserted they are known to pressure the water management district employees, who are working within a very political structure. One commenter (0429-Hughes) asserted that the Environmental Resource Permit (ERP) program is arbitrary and inconsistent with the fact that when a similar determination was made by the state of New Jersey in cooperation with the EPA and the Corps of Engineers, a buffer of 1,000 feet was implemented.

One commenter (0223) representing the state of Florida responded to other commenters that the 300-foot buffer is not arbitrary and is based on a reasonable delineation as agreed upon by FDEP and the Corps. The commenter stated that this approach was also reflected in the Final Report of the Assumable Waters Subcommittee (Final Report dated May 10, 2017), which is available for review on EPA's website at [ [HYPERLINK "https://www.epa.gov/cwa404g/nacept-assumable-waters-subcommittee-final-report-may-10-2017"](https://www.epa.gov/cwa404g/nacept-assumable-waters-subcommittee-final-report-may-10-2017) \h ]. The commenter stated that the Assumable Waters Subcommittee recommended an approach labeled "Wetlands Alternative C3," where the Corps retains all wetlands landward to a default 300-foot administrative boundary that is adjustable to accommodate the unique regulatory, topographical, and hydrological needs of the state. In recommending this approach, according to the commenter, the Subcommittee agreed that a 300-foot distance is "fully adequate to protect federal navigation interests" and allows the state to protect wetlands and water quality as required by the CWA. See Final Report at p. 27 and 33. According to the commenter, the Subcommittee favored Alternative C3 over the two other implementation strategies (Alternatives C1 and C2) because it retained the strengths of the previous two strategies, while also allowing the local resource needs and existing programs from states and tribes to effectively incorporate Section 404 requirements into their existing framework. Id. at 28. The commenter stated that, to further determine the efficacy of Wetlands Alternative C3, the Subcommittee measured the strategy against eight criteria that ranged from whether C3 was, as a whole, consistent with Section 404(g) and the CWA, to whether it provides clarity and efficiency in determining retained and assumable wetlands even outside 404 jurisdiction. The commenter stated that the Subcommittee found C3 met all eight independent criteria and provided the level of effectiveness and regulatory certainty the Subcommittee determined was necessary for 404 permitting. Id. at 33. The commenter reported that on July 30, 2018, the Assistant Secretary of the Army (Civil Works), R.D. James, accepted the Subcommittee's recommendation via a memorandum available on the Corps' website at [ [HYPERLINK "https://api.army.mil/e2/c/downloads/525981.pdf"](https://api.army.mil/e2/c/downloads/525981.pdf) \h ].